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15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 IN RE PORTFOLIO RECOVERY
18 ASSOCIATES, LLC TELEPHONE
19 CONSUMER PROTECTION ACT
20 LITIGATION

21 This Document Relates to All Member
22 Cases

Case No.: 11-md-2295-JAH-BGS

**Memorandum of Points and
Authorities in Support of Motion to
Stay Pending Ninth Circuit Court of
Appeals' Ruling on Constitutionality of
the TCPA**

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STATUTES

47 U.S.C. § 227.....1

47 U.S.C. § 227(b)(1)(A)(iii).....1, 2, 3 and *passim*

1 This Court should exercise its inherent authority to stay this multi-district litigation
2 because the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 – the statute
3 upon which every single Member Case is based – is at this moment subject to serious
4 constitutional challenge in multiple appeals before the Ninth Circuit Court of Appeals.
5 *See Gallion v. Charter Commc’ns Inc.*, No. 18-55667 (9th Cir. Mar. 23, 2018); *see also*
6 *Holt v. Facebook, Inc.*, No. 17-80086 (9th Cir. docketed May 12, 2017), *Brickman v.*
7 *Facebook, Inc.*, No. 17-80080 (9th Cir. docketed May 9, 2017), *Duguid v. Facebook,*
8 *Inc.*, No. 17-15320 (9th Cir. docketed Feb. 23, 2017). As argued in the *Gallion* opening
9 brief (attached as Exhibit 1 to the Declaration of Jennifer M. Robbins filed concurrently
10 herewith), the TCPA fails to pass constitutional muster because it imposes a content-
11 based—and thus “presumptively invalid”—restriction on speech while falling short of the
12 exacting standards of strict scrutiny analysis. Recognizing the import of the issues raised
13 by these appeals, a court in this District stayed a similar action under the TCPA less than
14 one month ago pending the Ninth Circuit’s ruling in *Gallion*, the furthest along of the
15 pending appeals. *See Meza v. Sirius XM*, No. 17-cv-2252-AJB-JMA, 2018 WL 4599718,
16 at *5 (S.D. Cal. Sept. 25, 2018) (“Because the constitutionality of 47 U.S.C.
17 § 227(b)(1)(A)(iii) is pending before the Ninth Circuit, the Court DENIES Sirius’ motion
18 to dismiss and STAYS the case pending a ruling in *Gallion v. Charter Commc’ns, Inc.*,
19 No. 18-55667 (9th Cir. Mar. 8, 2018).”). In doing so, the Court noted that “[i]f the Ninth
20 Circuit agrees with defendants that 47 U.S.C. § 227(b)(1)(A)(iii) is unconstitutional, then
21 the [plaintiffs’] ATDS allegations would have to be dismissed as they allege both of their
22 cellular telephones were called in violation of this provision.” *Id.*

23 The same is true for every Member Case now pending before the Court in this
24 multidistrict litigation. If, as the *Meza* court noted, the Ninth Circuit finds the relevant
25 portion of the TCPA unconstitutional, those Member Case claims arising under that
26 provision must be dismissed in their entirety, rendering moot the dispositive motions
27
28

1 currently before the Court. *See id.* Given the constitutional significance of the issue now
 2 before the Ninth Circuit in *Gallion*, this Court should exercise its discretion to stay these
 3 proceedings for a short period to allow the parties in *Gallion* to complete their briefing—
 4 now already begun—and to permit the Ninth Circuit to render its decision on this crucial
 5 and determinative question.

6 BACKGROUND

7
 8 As the Court is aware, the Parties’ pending dispositive motions center around the
 9 following section of the TCPA, which purports to make it unlawful:

10 (C) to make any call (other than a call made for emergency purposes or
 11 made with the prior express consent of the called party) using any
 12 *automated telephone dialing system* or an artificial or prerecorded
 13 voice . . . (iii) to any telephone number assigned to a paging service,
 14 cellular telephone service, specialized mobile radio service, or other
 radio common carrier service, or any service for which the called party
 is charged for the call, *unless such call is made solely to collect a debt
 owed to or guaranteed by the United States.*

15 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

16 Yet this very provision has come under sustained constitutional attack in the last
 17 year, both in the Ninth Circuit and elsewhere, based in part on the government debt
 18 collection exception highlighted above. Every district court considering such an attack,
 19 including one in this District, has concluded that this exception renders 47 U.S.C.
 20 § 227(b)(1)(A)(iii) a content-based restriction on speech, subject to strict scrutiny and
 21 thus “presumptively invalid.” *See Gallion v. Charter Commc’ns, Inc.*, 287 F. Supp. 3d
 22 920, 927–28 (C.D. Cal. 2018) (“[T]he debt collection exception ‘require[s] a court to
 23 examine the content of the message in order to determine if a violation of the TCPA has
 24 occurred, rendering section 227(b)(1)(A)(iii) content-based on its face and therefore
 25 subject to strict scrutiny.” (quoting *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036,
 26 1045 (N.D. Cal. 2017) (alteration in original)); *see also Am. Ass’n of Political*

1 *Consultants v. Sessions*, 323 F. Supp. 3d 737, 741–43 (E.D.N.C. 2018); *Greenley v.*
 2 *Laborers’ Int’l Union of N. Am.*, 271 F. Supp. 3d 1128, 1145 (D. Minn. 2017); *Mejia v.*
 3 *Time Warner Cable Inc.*, Nos. 15-CV-6445 (JPO), 15-CV-6518 (JPO), 2017 WL
 4 3278926, at *14 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook Inc.*, 240 F. Supp. 3d 1021,
 5 1032 (N.D. Cal. 2017); *Brickman*, 230 F. Supp. 3d at 1043-44, *cf. United States v.*
 6 *Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000) (“Content-based regulations are
 7 presumptively invalid.”) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)).

8 Although no district court has yet taken the momentous step of ruling this
 9 provision unconstitutional, the issue is now pending before the Ninth Circuit.¹ And under
 10 the well-settled precedent of both the Ninth Circuit and the Supreme Court,² the
 11 presumptively unconstitutional, content-based restrictions of 47 U.S.C.
 12 § 227(b)(1)(A)(iii) fail to meet the rigorous standards and heightened review of strict
 13 scrutiny. The statute’s content-based carveouts are not narrowly tailored, being both
 14 under- and over-inclusive, and there is no “compelling” interest in privacy sufficient to
 15 justify the statute’s blatant preference for government speakers and messages. *See*
 16 *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1290-93 (D.C. Cir. 1972)
 17 (“preference” for the “official voice” reflects “the kind of blatant government censorship
 18 which the framers of the First Amendment intended to outlaw forever.”) (Wright, J.,
 19 concurring); *see also Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998)

21
 22 ¹ To date, no Court of Appeals has ruled upon the constitutionality of the content-
 23 based restrictions in 47 U.S.C. § 227(b)(1)(A)(iii), although the Fourth Circuit has held
 24 an analogous state law statute unconstitutional under strict scrutiny. *See Cahaly v.*
Larosa, 796 F.3d 399, 405–06 (4th Cir. 2015).

25 ² Strict scrutiny is “the most demanding test known to constitutional law.” *See City*
 26 *of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Laws subject to it are “presumptively
 27 invalid,” *Playboy Entm’t Grp., Inc.*, 529 U.S. at 817, and “almost always violate the First
 28 Amendment,” *see DISH Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011).

1 (“[W]e are troubled by the wholesale exemption for government speech.”). And while the
 2 application of strict scrutiny to the offending provision is not necessarily fatal in and of
 3 itself, the Ninth Circuit has recognized that “[s]trict scrutiny applies to government
 4 actions that stifle or promote speech on account of its message. Such laws conflict with
 5 basic First Amendment principles valuing and protecting an individual’s right to decide
 6 which ideas and beliefs are worth expressing, and almost always violate the First
 7 Amendment.” *See DISH Network*, 653 F.3d at 777–78; *see also Playboy Entm’t Grp.,*
 8 *Inc.*, 529 U.S. at 818 (“It is rare that a regulation restricting speech because of its content
 9 will ever be permissible.”).

10 Because the presumptively unconstitutional statutory provision on which
 11 Plaintiffs’ claims are based is currently under review by the Ninth Circuit, and because
 12 the factors this Court must consider weigh heavily in favor of a stay, *see Single Chip Sys.*
 13 *Corp. v. Intermec IP Corp.*, 495 F. Supp. 2d 1052, 1057 (S.D. Cal. 2007), this Court
 14 should grant PRA’s request for a stay while the Ninth Circuit deliberates the *Gallion*
 15 appeal.

16 ARGUMENT

17 I. Legal Standard

18 A district court has “broad discretion to stay proceedings as an incident to its
 19 power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing
 20 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *see Lockyer v. Mirant Corp.*, 398 F.3d
 21 1098, 1109 (9th Cir. 2005). The Court’s discretionary power to stay a case stems from its
 22 authority to manage its docket “with economy of time and effort for itself, for counsel,
 23 and for litigants.” *Reynolds v. Cty. of San Diego*, No. 11-cv-1256 JAH(AGJ), 2017 WL
 24 3582953, at *5 (S.D. Cal. Aug. 18, 2017). “Such discretion is appropriately used when
 25 the resolution of another matter will have a direct impact on the issues before the court.”
 26 *San Diego Padres Baseball P’ship v. United States*, No. 99-cv-0828 W(LSP), 2001 WL
 27

710601, at * 1 (S.D. Cal. May 10, 2001). This rule applies broadly to the type of pending proceedings and “does not require that the issues in such proceedings are necessarily controlling of the action before the court.” *Mediterranean Enters., Inc. v. Ssangyong*, 708 F.2d 1458, 1465 (9th Cir. 1983) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 853, 863–64 (9th Cir. 1979)).

In considering a stay, the Ninth Circuit weighs “the competing interests which will be affected by the granting or refusal to grant a stay.” *Lockyer*, 398 F.3d at 1109 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). In weighing these interests, courts consider three factors: “(1) judicial economy; (2) the moving party’s hardship; and (3) potential prejudice to the non-moving party.” *Single Chip*, 495 F. Supp. 2d at 1057. Here, all three factors weigh heavily in favor of staying this action.

A. A stay will promote judicial economy.

The factors of judicial economy and the orderly course of justice are “measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc.*, 300 F.3d at 268. “For the sake of judicial economy, a stay may be granted pending the outcome of legal proceedings related to the case.” *Desarrollo Urbanistico Del Pacifico v. Genetics Reference Lab. US, LLC*, No. 15-cv-1729 JAH(DHB), at *1 (S.D. Cal. Oct. 18, 2017) (citing *Leyva*, 593 F.2d at 863-64). A district court may properly “find it efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which may bear upon the case.” *Mediterranean Enters.*, 708 F.2d at 1465 (quoting *Leyva*, 593 F.2d at 863–64).

And while issues in any independent proceedings need not be controlling for a stay to be entered, they certainly are in this case. More than a mere possibility exists that the proceedings before the Ninth Circuit “may bear upon the case.” *See id.* Indeed, as the

1 Court in *Meza* has already noted, the Ninth Circuit could render binding precedent which
 2 extinguishes Plaintiffs' TCPA claims in their entirety. *See Meza*, 2018 WL 4599718, at *5.

3 Where, as here, a case concerns issues also raised before the Court of Appeals, the
 4 risk of conflicting decisions serves judicial economy because otherwise it could "result in
 5 significant confusion and would likely extend litigation in order to address the
 6 inconsistent decisions." *Karoun Dairies, Inc. v. Karlacti, Inc.*, No. 08-cv-1521
 7 AJB(WVG), 2013 WL 4716202, at *5 (S.D. Cal. Sep. 3, 2013); *see also In re STEC*
 8 *Derviative Litig.*, Nos. 10-cv-00667 JVS (MLGx), 10-savc-00220 JVS(MLGx), 2012 WL
 9 8978155, at *8 (C.D. Cal. Jan. 11, 2012) (granting a stay because it would "obviate the
 10 threat of conflicting outcomes in the cases"). Moreover, if the resolution of an
 11 independent proceeding could moot an action, staying the action "avoids wasting judicial
 12 resources" and "judicial economy will be served." *Hanover Ins. Co. v. Mason McDuffie*
 13 *Real Estate, Inc.*, No. 16-cv-01114 JST, 2016 WL 7230868, at *4 (N.D. Cal. Dec. 14,
 14 2016).

15 As discussed above, the resolution of the constitutional question in *Gallion* could
 16 completely moot these entire proceedings. Plaintiffs here allege violations of
 17 § 227(b)(1)(A)(iii), the same provision subject to a constitutional challenge before the
 18 Ninth Circuit. If that provision is found unconstitutional, it would render "all ATDS-
 19 based allegations asserted by [plaintiffs] unfounded." *Meza*, 2018 WL 4599718, at *3
 20 (staying TCPA case pending resolution of Ninth Circuit's ruling on constitutional
 21 challenges). Moving forward with this litigation risks wasting substantial judicial
 22 resources, whereas a stay "would reduce the burden of litigation on the parties and the
 23 Court by allowing the Court to avoid issuing a dispositive Order in the midst of an
 24 uncertain legal environment." *Mackiewicz v. Nationstar Mortgage LLC*, No. 15-cv-465
 25 ORL (18GJK), 2015 WL 11983233, at *1 (M.D. Fla. Nov. 10, 2015). The Court could
 26 render a decision on summary judgment that subsequently may need to be revisited. Until
 27
 28

1 the constitutionality question has been settled by the Ninth Circuit, “[t]here is no rational
 2 reason to proceed further in this case.” *Munoz v. PHH Corp.*, No. 08-cv-0759 AWI
 3 (DLB), 2011 WL 4048708, at * 4 (E.D. Cal. Sep. 8, 2011) (“[A] stay will reduce the
 4 additional expenditure of the parties’ time and resources, which is of particular
 5 importance if the Supreme Court’s decision ultimately disposes of this action”).

6 **B. PRA faces substantial hardship if this case is not stayed.**

7 Absent a stay, PRA will face hardship in the form of inconsistent rulings and
 8 costly, potentially unnecessary litigation. The risk borne “from the hardship of enduring
 9 potentially inconsistent future rulings in the matters pending in the Southern District and
 10 the Ninth Circuit” constitutes prejudice warranting a stay. *Reynolds*, 2017 WL 3582953,
 11 at *6. A pending appeal on a controlling issue can cause prejudice to the defendant
 12 because the appellate court could “issue[] a decision that would require relitigation of
 13 [the] case in accordance with [the appellate] ruling.” *Rodriguez v. CleanSource, Inc.*, No.
 14 14-cv-0789 L(DHB), 2015 WL 12434307, at * 3 (S.D. Cal. Feb. 26, 2015). In fact, such a
 15 situation prejudices both parties. *Id.*

16 The constitutional challenges pending in the Ninth Circuit go to the heart of
 17 Plaintiffs’ claims in this case. If the Ninth Circuit agrees with the defendant’s well-
 18 grounded arguments in *Gallion*, then § 227(b)(1)(A)(iii) is unconstitutional under the
 19 First Amendment and the Plaintiffs in this case have no basis for recovery. Adjudicating
 20 issues of liability or continuing on the path of a potentially inconsistent finding is exactly
 21 the type of hardship or inequity this factor is designed to identify. It is just this sort of
 22 hardship and inequity that Defendants face if the litigation continues while the Ninth
 23 Circuit considers the constitutionality of the entire provision under which Plaintiffs seek
 24 to hold Defendants liable. Moreover, this and other courts within this Circuit have
 25 recognized precisely this type of hardship when weighing—and granting—stays. *See*
 26 *Prasad v. Santa Clara Cty. Dep’t of Soc. Servs.*, No. 15-cv-04933-BLF, 2016 WL
 27
 28

1 1734066, at *3 (N.D. Cal. May 2, 2016) (granting a stay pending resolution of an appeal
2 at the Ninth Circuit on a related question of law).

3 Indeed, in *Reynolds*, the defendant County of San Diego faced litigation related to
4 whether certain of its medical examinations were constitutional. 2017 WL 3582953, at
5 *6. The County argued that the matter should be stayed until the constitutional question
6 could be settled by the Ninth Circuit, which was concurrently considering the exact
7 question in a separate case. *Id.* Based on the argument that the Ninth Circuit’s
8 determination on the constitutional question “will likely control the outcome of this
9 case,” the court granted a stay pending the outcome of the Ninth Circuit appeal. *Id.*
10 (internal quotation marks omitted). The court held that enduring potentially inconsistent
11 rulings constituted sufficient hardship. *Id.*³

12 **C. Plaintiffs will suffer no harm from a stay.**

13 Plaintiffs can demonstrate no prejudice from a brief stay of these proceedings.
14 “Where a plaintiff seeks only damages for past harm and thus the only injury from a stay
15 would be a delay in monetary recovery, there is not a sufficient basis to deny a stay.”
16 *Gonzalez v. Compass Visions, Inc.*, No. 07-cv-1951. BEN(AJB), 2009 WL 10672485, at
17 *2 (S.D. Cal. Aug. 6, 2009); *CMAX, Inc.*, 300 F.2d at 268–69 (9th Cir. 1962) (delay of
18 recovery of monetary damages did not support a finding of harm). Here, the only issue
19 before the Court is Plaintiffs’ various requests for statutory damages, further diminishing
20 any claim to prejudice. *See O’Hanlon v. 24 Hour Fitness USA, Inc.*, No. 15-cv-01821
21 BLF, 2016 WL 815357, at * 4 (N.D. Cal. Mar. 2, 2016) (minimal prejudice because
22

23 ³ In addition to the substantial prejudice to PRA described above, the burden of
24 litigating this case is considered “a legitimate form of hardship” given that Plaintiffs
25 cannot “adduce evidence that [they] will be harmed by a stay.” *Krejci v. Cavalry*
26 *Portfolio Servs., LLC*, No. 3:16-CV-0211 JAH (WVG), 2018 WL 3533246, at *3 (S.D.
27 Cal. July 23, 2018) (quoting *In re Am. Apparel S’holder Derivative Litig.*, No. 10-cv-
28 06576 MMM (RCX), 2012 WL 9506072, at *45 (C.D. Cal. July 31, 2012)).

1 plaintiffs only sought statutory damages). Therefore, to the extent Plaintiffs claim a stay
2 will prejudice them by delaying any monetary recovery, that claim does not suffice to
3 show prejudice.

4 Likewise, Plaintiffs can point to no continuing harm a stay would exacerbate. PRA
5 has ceased contact with all Plaintiffs upon the filing of their complaints. Courts have
6 recognized that a TCPA plaintiff no longer receiving the alleged phone calls faces no risk
7 of ongoing harm. *See Lambert v. Buth-Na-Bodhaige, Inc.*, No. 2:14-cv-00514 MCE
8 (KJW), 2014 WL 4187250, at *2 (E.D. Cal. Aug. 21, 2014) (“[B]ecause there is no
9 indication that Plaintiff has received any text messages from Defendants since October
10 18, 2013, she is not suffering continuing harm and thus will not be prejudiced by a
11 stay.”); *Gusman v. Comcast Corp.*, No. 13-cv-1049 GPC(DHB), 2014 WL 2115472, at
12 *4 (S.D. Cal. May 21, 2014) (“Plaintiff will not be prejudiced since he stopped receiving
13 calls in the Fall of 2013 and the case is in the early stages of litigation.”); *see also*
14 *Reynolds v. Time Warner Cable, Inc.*, No. 16-cv-6165, 2017 WL 362025, at *2
15 (W.D.N.Y. Jan. 25, 2017) (finding minimal prejudice to plaintiff in staying TCPA case
16 when the defendant had stopped the calls at issue).

17 Additionally, the stay requested will not be immoderate, further diminishing any
18 potential prejudice to Plaintiffs. Courts assess whether “it appears likely that the other
19 proceedings will be concluded within a reasonable time in relation to the urgency of the
20 claims presented to the court.” *Krejci*, 2018 WL 3533246, at *2 (quoting *Leyva*, 593 F.2d
21 at 864). Here, the *Gallion* briefing will be completed no later than November 21, prior to
22 the completion of briefing on this motion. The Court, when faced with a similar schedule
23 in *Reynolds v. County of San Diego*, found “in light of the appellate briefing
24 schedules...that appellate proceedings may conclude within a reasonable time in relation
25 to the urgency of the claims presented to the court.” 2017 WL 3582953, at * 7 (quoting
26 *Leyva*, 593 F.2d at 864) (granting stay); *see also Meza*, 2018 WL 4599718, at *5.

1 Because there is no such urgency here, the limited nature of the requested stay supports
2 waiting for the Ninth Circuit to rule on this dispositive issue.

3 **CONCLUSION**

4 Balancing the three factors the Court must weigh counsels staying this case to
5 allow the Ninth Circuit to rule on the constitutionality of the provision sued upon. A stay
6 would serve judicial economy, relieve PRA from potential prejudice, and inflict no harm
7 upon Plaintiffs. Therefore, PRA respectfully requests a brief stay pending the Ninth
8 Circuit's ruling in *Gallion*.

9
10
11 Date: October 23, 2018

Respectfully submitted,

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